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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 933

THE PHILIP CAREY MANUFACTURING COMPANY, LLOYD A. FRY ROOFING COMPANY, AND THE RUBEROID CO., *Petitioners*,

v.

HONORABLE ROBERT L. TAYLOR, Judge of the United States District Court, Eastern District of Tennessee, Northern Division, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

CITATION TO OPINION BELOW

The Opinion of the Court of Appeals is reported at 286 F. 2d 782, and is printed in the Petition for Writ of Certiorari at page A-1.

JURISDICTION

Jurisdiction is fully covered in the Petition for Certiorari and the statement there made is adopted here by reference.

QUESTIONS PRESENTED FOR REVIEW

It is respectfully submitted that the record does not sustain the questions presented for review in the Petition for Certiorari and that the questions presented are as follows:

1. Whether 13 corporate defendants properly served and appearing in the transferor court and who could have been properly sued in the transferee court can object to a transfer under 28 U.S.C. § 1404(a) on the ground that other named, but unserved non-appearing and dispensable defendants, who were outside the personal jurisdiction of the transferor court, would not be subject to suit in the transferee court?

2. When an action involving 13 *served* and *appearing* corporate defendants and 73 individual defendants who were outside the personal jurisdiction of the court, is ordered transferred under § 1404(a) of Title 28, U.S.C., whether an objection to the transfer by three corporate defendants because the 73 individual defendants could not be sued on the transferee court is rendered moot by an order of the transferor court dismissing the suit as to the 73 individuals?

STATUTES INVOLVED

In accordance with Rule 40.3 of the Supreme Court Rules the respondent accepts the statutes involved as set forth in the Petition for Certiorari and adds thereto the following:

Clayton Act, § 12, 15 U.S.C. § 22, 38 Stat. 736:

"Sec. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

STATEMENT OF THE CASE

The statement of the case in the Petition for Certiorari should point out that the Amended Complaint was filed on March 21, 1960.

It should be pointed out that the question as to whether defendant Asphalt Roofing Industry Bureau was subject to suit in Mississippi was set for hearing before Judge Taylor on October 12, 1960, but on October 4th the plaintiff filed a notice of dismissal as to that defendant pursuant to Rule 41(a)(1)(i), of the Federal Rules of Civil Procedure.

It should be pointed out that subsequent to filing the Petition in the Circuit Court on November 25, 1960, plaintiff served notice of dismissal of all individual defendants in accordance with Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.

It should also be pointed out that on March 1, 1961, the defendant Asphalt Roofing Industry Bureau and all individual defendants were dismissed by order of Judge Taylor in accordance with Rule 21 of the Federal Rules of Civil Procedure.

REASONS WHY WRIT SHOULD NOT BE GRANTED

A. THERE IS NO SUBSTANTIAL QUESTION PRESENTED FOR REVIEW

It is well stated by Mr. Justice Reed in *Ruhlin* v. *New York L. Ins. Co.*, 304 U.S. 202 at page 206, that the purpose of the grant of jurisdiction to bring up cases by certiorari from Circuit Courts was to secure uniformity of decisions and to bring up to the Supreme Court cases of importance which were in the public interest to be decided by the forum of last resort.

The instant case is neither of peculiar gravity and general importance or necessary to secure uniformity of decision, nor does it conflict with a prior decision of this Court or of any United States Court of Appeals.

1. The Decision Below Does Not Conflict With Any Prior United States Supreme Court Decision

At pages 5-8 of the Petition for Certiorari it is contended that the decision of the Sixth Circuit Court of Appeals is in direct conflict with the decision of the Supreme Court in *Hoffman* v. *Blaski*, 363 U.S. 335.

The *Blaski* decision dealt with a strikingly different factual pattern and legal issue. There plaintiffs had brought an action for patent infringement properly against all defendants in the *only* judicial district where the action could have been brought. The defendants *properly* before the court sought, by *unanimous* action over plaintiffs' objections, to transfer the case to another federal court under the provision of 28 U.S.C. § 1404(a). This Court held that the defendants could not waive objections to venue in the transferee court and thereby conform to the requirements of § 1404(a). Thus, the defendants could not by their own consent

confer jurisdiction on the transferee court and force plaintiffs to try their action in a transferee district where plaintiffs could not have originally brought the action.

The Court of Appeals for the Sixth Circuit properly determined that the opinion in the *Blaski* case did not decide the issue presented in the case at bar. *Philip Carey Manufacturing Company* v. *Taylor*, 286 F. 2d 782, 783 (6th Cir. 1961).

In the instant case the individual defendants had not properly been sued in the transferor court. They were never before the court at any time. They could not be brought before the transferee court.

It is undisputed that *all* the corporate defendants transferred *were properly* before the court in Tennessee and could have been properly sued in Mississippi. Only three of the twelve corporate defendants are presenting an objection.

The mere fact ". . . that their [73 individual defendants] names were listed as defendants on the Complaint gave them no status as parties which should bar a transfer action.". *Philip Carey Manufacturing Company* v. *Taylor*, *supra*, at page 785. For all practical purposes, the individual defendants were "mere straw men" in the case. *General Accident Fire & Life Assurance Corp.* v. *Kirkland*, 338 S.W. 2d 549, 550 (Supreme Court of Tennessee, September 9, 1960).

The corporate defendants are in effect attempting to raise an objection which only the individual defendants could properly make. The individual defendants have never made any objection because they were not before the transferor court nor are they before this

Court. Indeed, it cannot be disputed that these individual defendants are no longer in this case since dismissals as to them have been entered. The corporate defendants who are subject to the transfer cannot take advantage of such a narrow construction to defeat the purpose of the transfer statute.

The three corporate defendants also are subject to a long established general rule that objection to venue is a personal objection and one defendant cannot object because the venue is improper as to another defendant. *Camp* v. *Gress*, 250 U.S. 308.

2. The Decision Below Does Not Involve a Legal Principle on Which the Circuit Courts of Appeals Are in Conflict

At pages 9-11 of the Petition for Certiorari it is contended that the decision complained of is in conflict in principle with the decisions of other Courts of Appeals as to the power of a District Court to transfer an action where such court lacks personal jurisdiction over all parties. (An analysis of the conflicting views is presented in *Hohensee* v. *News Syndicate, Inc.*, 286 F. 2d 527, 529 (3rd Cir. 1961) cited on pages 9 and 10 of the Petition for Certiorari.) The four Circuit Court decisions cited by petitioner on pages 9 and 10 of the Petition all involve the issue of whether absent personal jurisdiction *a defendant* or *defendants* may be transferred to a transferee court *where personal jurisdiction may be obtained*. The mould of the facts producing such an issue is sharply presented in the case of *Goldlawr, Inc.* v. *Shubert*, 175 F. Supp. 793 (S.D. N.Y. 1959), cited by petitioner on page 10 of the Petition. There, multiple defendants were sued in Pennsylvania. As to some of these defendants, the Pennsylvania court lacked *personal jurisdiction*. On motion

of plaintiff, transfer was granted to the Southern District of New York where personal service could be obtained. The District Court adopted the view that transfer was not authorized as to these defendants because personal jurisdiction in the transferor court was lacking. The District Court rejected the alternative of remanding the case to the transferor court since that court had determined it lacked personal jurisdiction and such remand would serve no useful purpose. The propriety of such action was affirmed by the Circuit Court of Appeals for the Second Circuit. Judge Hincks dissenting in part: *Goldlawr, Inc.* v. *Heiman*, F.2d , CCH 1961 Trade Cases ¶69,951 (2nd Cir. Feb. 21, 1961).

Obviously, the conflicting views concerning a transfer of a defendant not properly before the transferor court to a district where personal service may be obtained is not involved here.

There is no contention, nor has there *ever been* any contention that the individual defendants could be sued in Mississippi. Indeed, in the affidavit of counsel supporting the motion to transfer *no mention* was made of the *individual* defendants. (Pages 67 and 68 of Certified Transcript of Proceedings on Petition for Writ of Certiorari) Quite the contrary, in a supplemental affidavit supporting transfer the following statement was made:

> "Insofar [as] *Defendants* are concerned, *being large corporations*, Mississippi is as convenient a forum as Tennessee, if not more so." [Emphasis supplied.] Pages 70 and 71 of Certified Transcript of Proceedings on Petition for Writ of Certiorari.

B. ANY POSSIBLE REVIEWABLE ISSUE INVOLVED IN THE DECISION BELOW HAS BECOME MOOT

An abstract or moot question will not be reviewed by the Supreme Court, *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 15. Further, the Supreme Court will not ordinarily make any determination concerning the rights or liabilities of persons not made parties to the certiorari proceeding, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 89. And where by an act of the parties or a change in law "... the existing controversy has come to an end, the case becomes moot and should be treated accordingly." *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116.

As respondent pointed out in his brief before the Circuit Court the transfer order was not intended in any way to affect the rights of the 73 unserved defendants. "Under the antitrust statute (Section 22 of Title 15) only corporations can be served outside the state and to date not one of the individual defendants has voluntarily appeared, so that the effect, if any, of the transfer order upon any of them at this stage is strictly of theoretical and academic interest."

In an attempt to avoid any argument about such a hypothetical and trivial point, plaintiff filed on November 25, 1960, in the United States District Court for the Eastern District of Tennessee a discontinuance of the action against all the 73 named but unserved defendants.

The Sixth Circuit was of the opinion that the individual defendants were not properly dismissed under the provisions of Rule 41(a)(1)(i) of Federal Rules of Civil Procedure 28 U.S.C. and such dismissal should properly be accomplished under the provisions of Rule

21, Federal Rules of Civil Procedure. *Philip Carey Manufacturing Company* v. *Taylor, supra*, at page 785.

On February 29, 1961, the respondent entered an order in accordance with the provisions of Rule 21 dismissing the 73 individually named defendants and the Asphalt Roofing Industry Bureau. This act was not prohibited by the order of the Circuit Court of February 16, 1961 (set forth in Petition, Appendix page A-9) obtained by petitioner which simply prevented respondent from transferring the case to Mississippi. As Judge Hand pointed out in *Littman* v. *Bache & Co.*, 246 F. 2d 490, 492 (2nd Cir. 1957), an order to transfer does not *ipso facto* effect a transfer and that such interlocutory order is obviously not final. See also Moores' Federal Practice, 2d edition, volume 6, ¶54.12[1] at pages 115 and 116:

> "Similarly, an order is interlocutory that transfers an action to a proper venue, either under § 1406(a) . . . or under § 1404(a). . . . [B]ut in proper cases these interlocutory orders relative to transfer may be reviewed by mandamus and or prohibition . . . ."

The transfer order may now be considered to have been amended in effect to eliminate explicitly the 73 unserved defendants.

Clearly any possible argument based upon the effect of the transfer order on the 73 unserved defendants has been settled conclusively.

CONCLUSION

The frangible qualities of petitioners' arguments are distinct. The have failed to show any of the accepted grounds for granting certiorari. Accordingly, their petition for certiorari should be denied.

Respectfully submitted,

PEYTON FORD
Attorney for Respondent

Of Counsel:

FORD, LARSON, GREENE AND HORAN
ARTHUR JOHN KEEFFE

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION AT KNOXVILLE

Civil Action No. 4012

LEOPARD ROOFING COMPANY, INC., *Plaintiff*

v.

ASPHALT ROOFING INDUSTRY BUREAU, ET AL., *Defendants*

Notice of Dismissal as to the Defendant, Asphalt Roofing Industrial Bureau

Comes the plaintiff, Leopard Roofing Company, and hereby gives notice of its voluntary dismissal of this action as to the defendant, Asphalt Roofing Industry Bureau, no answer or motion for summary judgment having been filed by said defendant. This dismissal is without prejudice to the rights of the plaintiff to refile this action as to said defendant.

This 4th day of October, 1960.

LEOPARD ROOFING COMPANY, INC.

By: WILL WILSON
Attorney

Notice of Dismissal as to the Individual Defendants

Comes plaintiff, Leopard Roofing Company, and it appearing that the following individual defendants have not been served with process, hereby gives notice of its voluntary dismissal of this action as to the following defendants:

Lloyd A. Fry, Sr., Lloyd A. Fry, Jr., William H. Barthel, Joseph Fisher, Harold C. Adsit and L. W. Woodward;

E. J. O'Leary, Herbert Abraham, Stanley Woodward, E. M. Railton, F. E. Byrnes, Fred Sweeney, H. S. Roberts, John Taylor Meredith and J. E. Hall;

Rawson G. Lizars, Malcolm Meyer, J. R. Johnson, F. R. Weddington, Dan Le Bow, A. O. Graves and J. L. Strickland;

A. R. Fisher, C. B. Burnett, Roger Hackney, W. R. Wilkinson, H. M. Ball and J. L. Wood;

I. J. Harvey, Jr., G. J. Pecaro, D. J. Mc Namara, H. L. Evans, A. O. Eaton and J. A. Main;

R. S. King, J. W. Humphrey, H. R Barrett, E. C. Faulkner, C. E. Howard, E. J. Fasold and E. F. Ziegenhardt;

Kerby A. Fisk, Glenn B. Miller, Carleton Bates, George A. Bennington, L. A. Coleman and Richard F. Hansen;

C. S. Bird, H. H. Anderson, W. C. Ahlgren and R. A. Wilkins;

Fowler B. McConnell, Charles H. Kellstadt, R. E. Brookes, Edward Gudeman, Austin T. Cushman, Crowdus Baker, Arthur M. Wood and Donald Mac Arthur;

C. H. Shaver, O. M. Knode, H. F. Sadler, R. D. Stephen, C. F. Axelson and F. L. Stellner;

O. S. Mansell, H. W. Collins, C. L. Christenson, F. A. Irvine, W. D. Becker, C. W. Johns and Richard Thompson, Jr.;

A. R. Fisher, C. B. Burnett, Roger Hackney, W. R. Wilkinson, Herbert Morton Ball and J. L. Wood.

This 25th day of November, 1960.

LEOPARD ROOFING COMPANY, INC.

By: WILL WILSON
Attorney

Order Dismissing Certain Named Defendants

And now, to-wit this 1st day of March, 1961, upon motion of the plaintiff to dismiss the action, without prejudice to plaintiff, against the following named defendants:

Asphalt Roofing Industry Bureau, J. S. Bryant, Lloyd A. Fry, Sr., Lloyd A. Fry, Jr., William H. Barthel, Joseph Fisher, Harold C. Adsit, L. W. Woodward, E. J. O'Leary, Herbert Abraham, Stanley Woodward, E. M. Railton, F. E. Byrnes, Fred Sweeney, H. S. Roberts, John Taylor Meredith, J. E. Hall, Rawson G. Lizars, Malcolm Meyer, J. R. Johnson, F. R. Weddington, Dan Le Bow, A. O. Graves, J. L. Strickland, A. R. Fisher, C. B. Burnett, Roger Hackney, W. R. Wilkinson, H. M. Ball, J. L. Wood, I. J. Harvey, Jr., G. J. Pecaro, D. J. Mc Namara, H. L. Evans, A. O. Eaton, J. A. Main, R. S. King, J. W. Humphrey, H. R. Barrett, E. C. Faulkner, C. E. Howard, E. J. Fasold, E. F. Ziegenhardt, Kerby A. Fisk, Glenn B. Miller, Carleton Bates, George A. Bennington, L. A. Coleman, Richard F. Hansen, C. S. Bird, H. H. Anderson, W. C. Ahlgren, R. A. Wilkins, Fowler B. Mc Connell, Charles H. Kellstadt, R. E. Brookes, Edward Gudeman, Austin T. Cushman, Crowdus Baker, Arthur M. Wood, Donald Mac Arthur, C. H. Shaver, O. M. Knode, H. F. Sadler, R. D. Stephen, C. F. Axelson, F. L. Stellner, O. S. Mansell, H. W. Collins, C. L. Christenson, F. A. Irvine, W. D. Becker, C. W. Johns, Richard Thompson, Jr., A. R. Fisher, C. B. Burnett, Roger Hackney, W. R. Wilkinson, Herbert Morton Ball, J. L. Wood, and it appearing to the Court that none of the above-named defendants have been served with process and none are indispensable parties; the enumerated defendants are hereby dismissed, without prejudice to the plaintiff, from the above-captioned action.

It is so ordered.

ROBERT L. TAYLOR
Judge, United States District Court,
Eastern District of Tennessee,
Northern Division